

Before Chairperson Joan Donoho, Robert S. Ehrlich, Robert I. Samuel, Diana Jones, and Charles Morris comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for October 12, 1999. Both the Appellant, the Glade LLC ("Appellant") and Appellee, Department of Natural Resources and Environmental Control, ("DNREC") appeared and presented evidence in the form of testimony and exhibits to the Board. The following is the Order of the Environmental Appeals Board. ("EAB").

STATEMENT OF THE CASE

By letter dated July 25, 1997, The Glade, L.L.C. filed this appeal of an application for Subaqueous Land Permit SP/1709/96 and Wetlands Permit WE-1809-96 regarding Lot 68 of The Glade. The Glade L.L.C. asserts it was substantially and adversely affected by the denial of the permits in that such disregarded Appellant's riparian rights and was based on an arbitrary rating or evaluation system.

The Appellant argues its application met the criteria necessary for a wetland walkway pier and dock under the applicable statutes and regulations. The Appellant asserts the cumulative impacts analysis used by the Secretary did not take into account voluntary reductions already made and was based upon an arbitrary impact assessment scale, the matrix. The Appellant further asserts that others similarly situated and requesting permits were granted such permits.

Following the filing of this appeal, and prior to the first scheduled hearing on this appeal for January 27, 1998, the parties requested a stay to pursue settlement negotiations. The settlement negotiations resulted in the settlement of several other appeals, however, the Glade L.L.C. and the Secretary were unable to reach an agreement to resolve this appeal. By letter dated February 23, 1999, to the Department of Justice, the Glade L.L.C. requested this appeal be placed back on the calendar for a hearing before the Board.

The position of DNREC is that the Glade is a limited resource for which the State has to balance interests and draw lines to protect against negative environmental impacts. DNREC asserts the cumulative impact analysis and the matrix were both reasonable methods by which to measure the impacts at the Glade and issue permits.

A motion to dismiss and a motion in limine were filed thereafter by counsel for the Department. The motion in limine was resolved by this Board's Order dated June 18, 1999. The motion to dismiss was denied, however, the Board allowed the Department to raise the issue again at this hearing should the evidence presented support the motion.

SUMMARY OF THE EVIDENCE

The evidence in this matter consists of the August 14, 1996, application form from the Glade L.L.C. for a pier and dock; a July 3, 1997 letter from William Moyer, Wetlands and Subaqueous Lands Section notifying Mark Woodruff of the denial of his application; a July 3, 1997 letter from William Moyer notifying the Glade, L.L.C. of the denial of its application; a July 25, 1997 letter from John A. Sergovic, Jr., Esq. appealing the permit denial to the Board; an August 18, 1997 letter from the Board to Mr. Sergovic acknowledging receipt of the appeal; the January 15, 1998 request for continuance; a February 23, 1999 letter requesting the rescheduling of the hearing and the June 18, 1999 Order of the Board regarding the motions. In addition to these documents, the Board was presented with evidence in the form of testimony, documentation, illustrations and pictures from various witnesses.

The first witness testifying on behalf of the Glade, L.L.C. was Edward M Launay. Mr. Launay is the president of Environmental Resources, an environmental consulting firm. He holds a Bachelor of Science Degree in Environmental Management and Planning and a Bachelor of Arts

Degree in Biology. His firm specializes in environmental permitting, state, federal, and local. In particular, the firm prepares applications for projects involving land use issues. Mr. Launay is also a resident of The Glade.

Mr. Launay testified regarding the original subdivision of the Glade by the Holland family. He testified there are 41 riparian lots bordering the Holland Glade waterway. Mr. Launay testified regarding the lay out of the Glade using a map. (Exhibit 1) Mr. Launay testified that each lot owner owns to the center of the Holland Glade Creek as opposed to the mean high water line or the mean low water line. Therefore, the owners do not require a lease from DNREC for the subaqueous lands.

Mr. Launay testified this marsh is a typical marsh, vegetated by two species. *Spartina alterniflora* or salt marsh cord grass is primarily found although some portions of the marshes are vegetated by *Spartina patens*. The marsh is typical of those in Delaware. It is not unique in terms of its type or benefits it provides. He testified it is a functional marsh in good condition. Mr. Launay testified these types of marsh habitats have been preserved and protected since the 1972 regulations were put in effect.

Mr. Launay testified that any intrusion will have an effect on the marsh. The programs of DNREC and the Corps use tests to ensure the applicant tries to "minimize the potential impacts of whatever is being proposed through modifying the proposed structure or making sure that the proposed structure . . . lessens to the maximum extent practicable in terms of the size and height and other things."

Mr. Launay testified regarding the history of the Glade and his involvement. He testified he first became involved in 1989 to prepare an application for a dock and pier. There were several other owners contemplating applications for piers at the Glade and on November 15, 1993, there was a site

visit by Mr. Moyer, himself and Mr. Van Fossen. Mr. Van Fossen was the primary owner of the remaining lots for sale at the Glade. The meeting was to discuss concerns and what might be done to minimize structures to make the docks and piers at the Glade more acceptable to DNREC. Mr. Launay testified he was not aware of an application having been fully processed as of that point.

Mr. Launay testified that he learned on December 1, 1993, that the Department of Parks & Recreation had purchased the wetlands on the opposite side of the Glade in a land swap deal. This meant to him that the State controlled whether or not any disturbance would be undertaken of the marsh on the North side. During further correspondence with Mr. Moyer, there were discussions of sharing walkways on some of the piers and discussions regarding the Department's concerns. Mr. Launay testified that he was asked by Mr. Moyer to prepare an alternative analysis to indicate whether single piers may cause less impact than a community marina.

Mr. Launay testified he performed the analysis at Mr. Van Fossen's (the Glade L.L.C) expense. The analysis indicated a marina to facilitate 40-some boats would require a substantial amount of dredging and destruction of salt marsh would occur. Further, a long wide boardwalk would be necessary along the Glade or the Lewes-Rehoboth Canal. It was Mr. Launay's opinion that this alternative and others considered would have created equal or much greater environmental impacts than individual owners having piers at their lots. He further believed that all of the alternatives to individual piers would have been denied by the federal agencies dealing with similar permitting.

Following these discussions with the Department, there was a long process whereby the Department, Mr. Launay and the Glade L.L.C. attempted to notify all of the Glade residents regarding the discussion surrounding the Glade waterway. There were attempts to determine which

land owners desired a dock and pier so they knew how many walkways crossing the wetlands and the length of the walkways involved. Mr. Launay testified that he suggested some owners sharing piers (walkways) with separate docks on the end. It was further suggested that they would keep the walkways at a minimal width of possibly three feet or less and the dock structures could be minimized in size. In addition, Mr. Launay testified that the applications set forth a maximum berthing area. The berthing area is the largest area that would facilitate a boat. This was done because some land owners may change their boats over time.

Mr. Launay testified regarding discussions about deed restricting some of the lots. He testified that Mr. Van Fossen had offered to deed restrict some lots he still owned so that piers could not be built. The Department misunderstood and believed Mr. Van Fossen intended to deed restrict those already sold whose owners were not presently requesting piers or docks. Mr. Launay testified he believed the Department thought these landowners would voluntarily consent to restricting their lots from ever having a pier. Mr. Launay testified this was an impossible thing to do for various reasons.

Mr. Launay testified that Mr. Esposito, from DNREC, set a benchmark of approving a maximum of 16 piers and 24 boat docks if the deed restrictions were, in fact, put in place. When it became clear they could not proceed with this plan, the Department suggested the Glade L.L.C. and the people interested in building piers and docks put together a package application. Essentially, the individual land owners would retain someone to prepare their applications and the Glade as a subdivision would assemble the applications jointly and submit them to the Department.

Mr. Launay testified that prior to the joint submission, some individual permits were submitted separately to the Department. Mr. Strother, Mr. Fritz, Mr. Reed and Ms. Engle submitted

applications. Some of which were incomplete and returned by the Department. The remaining were held by the Department pending the negotiations with the Glade. The group application was submitted August 20, 1996, and included 13 applications for 12 shared piers and one single pier. The single pier was for the Glade L.L.C. and the subject of today's appeal. The application would have allowed for 25 boats.

Mr. Launay testified that at this time the Department had 16 applications before it involving 28 boats altogether. Following the submission, Mr. Launay was advised by Mr. Esposito that the Department was going to start processing the applications it had received initially. The permits were subsequently issued to Mr. Strother, Mr. Reed and Ms. Engle. Mr. Launay testified that he was surprised by the approval of the Strother and Reed applications since they were two lots right next to each other and could have shared a pier. Further, both of their piers had five foot wide by twenty foot long docks as opposed to the smaller ones, four-by-ten, submitted in the joint applications package. The three applications approved by DNREC were submitted as Exhibit Glade 4.

Mr. Launay testified that until this point he had not heard of a matrix scoring system being implemented by the Department. Mr. Launay testified he was not advised of any process ahead of time which the Department had developed for evaluating the 13 applications. He testified he received a letter in September of 1996 wherein the Department stated it had a number of questions. The Department wanted an analysis to determine whether metal screw pilings could be used in lieu of wood pilings. Following some correspondence back and forth with the Department he was advised that on January 14, 1997, there would be an in-house meeting between Mr. Moyer's group and the Department of Parks & Recreation and the Fish and Wildlife Department. Mr. Launay testified that following that meeting he learned that boat size was a concern to the Department. This

was the point during which the maximum berth areas were discussed to resolve the issue.

Mr. Launay testified that he did not learn of the matrix system until February 14, 1997. He was not asked to provide any input regarding this evaluation process. He testified that on March 27, 1997, he met with Ms. Herr at which time he was briefed on the matrix system and given a list of a preliminary decisions of who they intended to approve and deny. When the final decisions were issued they were essentially the same as these preliminary decisions. Mr. Launay then testified regarding the matrix scoring system used for the Glade/Woodruff lot. (Exhibit Glade 5)

Mr. Launay testified in detail regarding the matrix scoring system including the "category" section and the "explanation of scales". He testified there were different scores for shared versus individual piers, pier location, encroachment, walkway length, exceeds allotment, and mean low water depth. Each of the scores were then multiplied by a weighing factor which set forth the Department's determination of which factors were more important than others.

Mr. Launay testified that he reviewed the scores of the Glade L.L.C. application and he believed the pier location score should have been a three instead of a four because he believed it was centrally located regardless of how one chose to rank by location. Mr. Launay testified that the "encroachment" score was irrelevant because he and Laura Herr had previously adjusted all of the applications to make sure each permit approved would meet the 20 percent rule. Mr. Launay further testified that the "walkway length" score was unfair because it did not take into account those piers which extended well beyond 250 feet. He testified that those with piers longer than 250 feet would receive the same score as those which extended between 151 to 200 feet. He likewise testified that it was unfair because the first increment was zero to 100 receiving the same score, yet the remaining increments were by fifty.

Mr. Launay testified that from the beginning, the most important criteria of concern that the Department expressed to him was the number of walkways across the marsh and the length of the piers out to the docks. Mr. Launay testified that the score for the Glade L.L.C. should have been more like 105 instead of 155. He believed the Department should have looked at the exact length of each pier since that was the most important criteria to them.

The final criteria Mr. Launay testified regarding was "exceeds allotment". He testified that he believed this criteria was irrelevant as well. The "exceeds allotment" category dealt with a sub-score divided by 30 (30 people or decisions). If a pier was above the allotment for that application they would receive a four. If they were below the allotment they received a two. Mr. Launay testified that adding the allotment score did not change whether an application was above or below a particular number, it simply makes more of a separation as to who is above and who is below. Mr. Launay testified that almost everyone ended up with the same mean low water depth score, although it was a valid thing and a good score. He testified that the category did little to change the final answer.

Mr. Launay testified that the Glade L.L.C. score was a 155 and was denied, however the Strother application had the same score and was approved. He testified that the Glade's score should have been a 145, the same as Reed and Engle, who likewise had permits issued. Mr. Launay testified that in the application he prepared for the Glade L.L.C. he attempted to address impacts, a discussion of the impacts, and a discussion of the project. He described the history of the Glade including the number of lots, acres of wetlands, length of the pier, size of the dock, methods of minimization, etc. He testified that his report indicated that even if all of the permits were approved, the actual boat traffic would increase only minimally. The project would involve 2.02 percent of the

privately owned wetlands and 0.016 percent of the impact area of wetlands within the Glade subdivision. Mr. Launay proceeded to show the Board pictures of prior structures, typical views of the marsh, and pictures of structures which have been authorized. (Exhibits Glade 6 and 7)

Mr. Launay testified regarding the depth of the channel and how that affected the matrix system. The channel depths in front of the different lots vary quite a bit. The water is usually a bit deeper outside of the meander than inside of the meander. He testified the difference on average between mean low water and mean high water on any tide cycle out at the Glade is roughly about 2.2 to 2.5 feet resulting in a good deal of flushing in and out of the waterway. Mr. Launay testified that there are no large boats at the Glade and the largest boat authorized is eight by twenty five. An inboard motor could not be used at the Glade.

Mr. Launay testified regarding a scoring system that he developed for the Glade. (Exhibit Glade 8) He testified that when he scored the lots he used the controlling depth of the channel as he determined that to be a more important criteria than depth at the edge of the dock. Mr. Launay testified he used the most relevant criteria from the Department's matrix in developing his scoring system. He changed the pier length score to the nearest ten feet and also used the minimum length for each particular lot that a pier could be placed. He further scored them based on the relative distance compared to the other lots with scores ranging from 10 to 100. Mr. Launay testified that he used scores of 10, 20 and 30 to indicate the three depths possible with 10 being the deepest and 30 the most shallow.

Mr. Launay testified that he performed a calculation to determine the 100 percent impact should every person build a single pier. The minimum lengths of piers would total 8,600 linear feet. His calculation resulted in a 50 percent impact figure of 5,300 and then proceeded to do a

running total to see how many piers would be permitted and what the length of the piers would be permitted up to 5,300. He testified that everyone with a score of 310 or less would have been permitted. This would have amounted to 27 piers approved and 14 denied. The length of the piers would have been less than half of the total amount or 4,000 feet.

Mr. Launay testified further regarding his calculations and scoring system reaching the conclusion that had every permit that the Department received as part of his package been approved the percent of impact reduction would have been 53.7 percent. He further testified that had the additional permit from Mr. Seglum been approved, the impacts would still have been less than 50 percent. Mr. Wern's permit request however, would have put them under 50 percent. He then proceeded to testify regarding the piers presently established in the Glade as a result of previous permitting and settlements by the Department. There are presently 13 piers with a total length of 2,310 feet authorized and a total score of 3,960, representing 37.4 percent of the 50 percent total of 5,300 or a 62.6 percent reduction in impacts. Mr. Launay testified that the Glade went from 41 piers that could have been built to 14, assuming the permit for the Glade L.L.C. is approved. This results in an impact reduction of 66 percent.

Mr. Launay further testified that the total number of linear feet of piers could have been 8,600 feet, had the Glade lot owners not been willing to minimize the impacts. Should the Board approve the Glade L.L.C. permit, it would result in a 71.3 percent impact reduction of the maximum impacts. Mr. Launay testified that the lot owners made tremendous concessions of minimizing the impacts of their docks and piers on the waterway.

Under cross-examination, Mr. Launay testified that Mr. Woodruff backed out of the contract with the Glade L.L.C. to purchase lot 68 and is now the owner of lot 81. He purchased lot 81 from

Mr. Strother since it already had a pier on it. He further testified that Mr. Woodruff no longer has an option to purchase lot 68.

Mr. Launay testified that the permits for Mr. Strother, Mr. Reed and Ms. Engle were approved first because the Department prioritized processing the applications that were submitted and complete. The processing of these permits was done before the matrix system was used. Mr. Launay further testified that from time to time purchasers buy riparian lots for resale. As a safeguard by the Department, a permitting condition required registration for a boat be provided before building the dock. Mr. Launay was unaware of the condition of registration being a regulation. He stated it was just applied to the Glade.

Mr. William F. Moyer testified on behalf of the Department. Mr. Moyer testified he is the section manager of the wetland and subaqueous section within the Division of Water Resources. He has been with the Department since 1974. He testified he first became aware of structures being contemplated for the Glade Development in early 1993. Mr. Van Fossen requested he visit the Glade and take a boat trip to discuss the potential for access across the wetlands to a docking facility by lot owners. Mr. Moyer testified he has been to the Glade eight to ten times. At his first meeting with Mr. Van Fossen in 1993, the Glade was a pristine marsh ecosystem with expansive ecosystems on either side of the water body. He testified the Holland Glade is listed as one of Delaware's outstanding nature areas in Lorraine Fleming's book from the Delaware Nature Society. He characterized it as a "unique ecosystem". Mr. Moyer testified that on his most recent visit to the Glade he observed a number of boardwalks and docks. He took a trip up the Glade to examine what impact the walkways and docks were having.

Mr. Moyer testified that the first letter received by the Department for structures on the Glade

was received in 1994. The proposal by the Glade involved shared walkways along common property boundaries between two lot owners with a V on the end and a dock for each of the adjacent property owners. This would have led to 16 walkways and 32 or 34 docks out of the 41 lots. Mr. Moyer testified that the Department found this concept more acceptable than single walkways and docks for each property owner, however the Department had concerns regarding a number of issues including cumulative impacts. Safety with navigation was another concern. He testified that the Department asked the Glade to assess who wanted a dock and how the Glade could minimize the impacts of everyone having a shared dock.

Mr. Moyer testified that the letter of August 8, 1995 (Exhibit Glade 3) was a memorialization of lengthy negotiations with the Glade and set forth conditions under which the Department could proceed with processing applications for permits. It specified a number of docks and walkways that the Department would accept. It further stated the Department would not allow dredging to take place as part of any permit and that there would be deed restrictions placed on any unsold lots. Lastly, it noted there would be no permits issued for lot owners not owning a boat or contemplating owning a boat.

Mr. Moyer testified that they offered to begin processing applications as a "show of good faith". The Department determined that some applications had been pending since 1993 and 1994 and it was unfair to hold them any longer. Mr. Moyer testified the Department agreed in good faith to process those applications and issue those permits. Those permits were for Mr. Strother, Mr. Reed and Ms. Engle. Ms. Engle's application was for a repair and replacement and not a new dock structure.

Upon cross-examination, Mr. Moyer testified that although the picture of lot 54 (Ms. Engle's

lot) does not appear to indicate a dock at the end of the structure, he recalled from previous photos he has seen of that facility that something was at the end at some point in time. Mr. Moyer testified that the original structure was put in before the Department had the regulations and following the adoption of regulations a footbridge was exempted from permit requirements. In 1992, the regulations were amended to better define a footbridge and determined it was not for docking purposes. There was some discussion regarding whether or not a duck blind was constructed at the end of Ms. Engle's walkway and whether or not a docking structure was at some point present.

Mr. Moyer testified that owning a boat prior to receiving a permit is not a regulatory requirement. He further testified that following the August 8, 1995 letter, it was clarified that the Glade could not deed restrict lots which it did not own.

Under re-direct Mr. Moyer testified that the deed restricting was never done by the Glade, the repair and replacement permitting process is similar to the permit approval process however, public notice is not necessary.

Mr James T. Chaconas testified on behalf of the Department. Mr. Chaconas testified he is an environmental scientist with the Department's wetlands subaqueous land section. He has been employed in the field of environmental science for 22 years and employed by DNREC for 5 years. He testified that he has visited the Glade approximately 40 to 50 times. The first time was in the spring of 1994. At that time he observed a very-high quality fully functioning tidal wetland with a nice meandering tidal gut dissecting the wetland. Most recently he visited last week and observed on the developers side of the gut 13 wetland walkways and 23 docks, providing dockage for 25 boats. On the other side the wetlands were still intact. The walkways are in clusters of groups of three or four up the Glade. Boats were moored at several of the docks. He testified the quality had

not visibly declined. Although the bottom was different than he remembered, it could be due to boat traffic or storm activity.

Mr. Chaconas testified he co-authored the memo regarding the Department's denial of the Glade L.L.C. application. John Swartz, an environmental scientist in their section, was the other co-author and he is no longer employed by the Department. Mr. Chaconas testified the Glade/Woodruff application proposed a 162 foot long by 3 foot wide walkway pier and a 4 by 10 foot dock on the end. He testified this application was scored on the matrix as it was part of a batch of applications the Department was looking at to equitably and objectively rate for permitting.

Mr. Chaconas testified the salt marsh is the beginning of the food chain for many fish that live in the ocean. This biomass produces organic materials that begin to fill the phytoplankton and zooplankton, which are fed on by the small fish living in the gut area of the waters around the Glade. The small fish are feeder fish for the larger fish in the ocean and the food chain proceeds from there. Mr. Chaconas testified the Holland Glade was a typical high-quality salt marsh habitat. He testified high-quality wetlands have several environmental functions. They are part of the food chain, provide filtering for pollutants in the environment, provide flood abatement, recreational activities, and a high habitat value. Lesser quality wetlands would not have all of these functions.

He testified the wetlands provide shelter for the animals, places to nest, and allow them to hide from predators. The animals living in the wetlands also provide a source of food for other animals. High-quality wetlands provide removal of pollutants from the environment. Urban runoff and agricultural runoff can be intercepted by the wetlands. There is also very high biological activities within these soils and these microorganisms and plants can help assimilate these pollutants and remove them from the environment or keep them from being more mobile in the environment.

This in turn helps cleanse the waters.

Mr. Chaconas testified that he determined the Holland Glade had a marginal value for boating. He testified that he has boated several times in the Glade and he has run aground and had to push off. It is difficult to maneuver through the waterway without hitting bottom. He testified it kicks up a lot of sediments on the bottom of the waterway as you move through. The type of boat he was in was a 15 foot runabout with a 40 horsepower motor. This type of boat has about a one foot draft.

Mr. Chaconas testified that within the sediments live the benthic community or benthos. These are juvenile insects or insect larva, crustaceans, shellfish, and small animals. The diversity and richness of the benthic community is often an indicator of water quality, therefore, the more rich the benthic, and the more diverse, the better your juvenile fish population will be in the waterway. Kicking up the sediment where the benthic organisms live destroys their habitat. Mr. Chaconas testified that by dissecting the marsh or fragmenting the marsh into smaller units with wetland walkways, negative environmental impacts are caused. Such fragmenting cuts off or disrupts migratory routes of animals that use the marsh, opens a pathway to more invasive weed species of plants to move into the marsh and provides pathways for predators that normally could not get to the marsh. Animals such as skunks, foxes, and house cats could go under the walkways and would be predators using this mode of entry into the marsh. It also increases the amount of human activity in the marsh, which reduces its usefulness to the wild animals who do not like to be around human activity.

Mr. Chaconas testified that each additional structure built in the marsh has a negative environmental impact. The structures are built with lumber treated with chromated copper arsenate

which kills the worms that would get into the wood. This material leaches into the soil, becomes mobile during tidal ebb and flow and kills living things.

Under cross-examination Mr. Chaconas testified he did not do any in-depth empirical testing with respect to the difference in the marsh between 1994 and the present. The marsh appeared reasonably healthy and the structures present were built pursuant to permits. He further testified that the structures built were "deemed not to have impacts that [the Department] could not tolerate based on [its] regulatory criteria". In response to a question by the Board, Mr. Chaconas testified that there is plastic lumber that can be used in lieu of the treated wood, however it is fairly expensive and somewhat untested in this region.

Ms. Laura M. Herr testified on behalf of the Department. Ms. Herr testified that she is the program manager with the wetlands and subaqueous land section of the Division of Land & Water Resources. She has been employed in environmental science for 17 years. She testified that she has visited the Glade approximately 20 times, the first being in the summer of 1993 after receiving Mr. Strother's application. The most recent time was early spring of 1999.

Ms. Herr explained the matrix to the Board. She testified that the matrix was a tool developed to try to assess cumulative impacts of docks and piers, and wetland walkways on the wetlands and underwater lands. Ms. Herr testified that the matrix was developed because of the Department's growing concern about real cumulative effects of the docks and piers on the shore lines or wetlands and waterways. She testified that during the 1970's and 1980's the Department routinely granted applications for wetland walkways and docks and piers. However, with the intense development pressure, particularly in the inland bays ecosystem and the continuing increase in congestion and development pressure throughout that ecosystem, the Department became more

concerned about the cumulative effects of all the walkways, docks, and piers.

She testified the matrix is not an attempt to inject new regulatory criteria that have not been previously applied to projects prior to the matrix. It was a "new framework within which to couch the regulatory criteria that [the Department] ha[s] been applying all along, but to try to put it in a framework so that we could in a more consistent and objective fashion look at the impacts of one structure versus another within a particular watershed or at a certain project location."

Ms. Herr testified the matrix was not used in making the permit decisions of Reed, Strother, or Engle. She stated that Reed and Strother were granted before the batch of applications were received by the Department. Ms. Engle's application came later however, it was considered a repair-replace of an existing structure and got a different level of review than a brand new structure. Ms. Herr testified that an internal developmental team of scientists from various sections worked together to develop the matrix. The matrix was developed after the Department received, in a six-week period, a batch of 15 applications. Thirteen were part of Mr. Launay's package and two came from another agent. She testified it was very rare that the Department received such a large influx of applications in a short period of time for a relatively undeveloped system.

The goals of the team were to reduce the impacts of existing structures plus those pending applications by 50 percent. When scoring the matrixes for the applications they needed to score the structures already in place so they could account for those impacts as part of the baseline. Ms. Herr testified that they did not use a theoretical maximum such as every lot owner building a dock and walkway because that number was beyond their control. Lot owners could always apply for an additional walkway or dock and those that shared could always apply for their own walkway and dock. Instead, Ms. Herr testified that the Department used the impacts of structures already present

or applied for. The Department chose to reduce these impacts by 50 percent.

Ms. Herr testified that the second goal was to cluster permit approvals where possible. This would reduce the impact of fragmentation of the marsh. Both of these goals acted in concert. Ms. Herr provided the Board with a sample matrix and explained the matrix analysis. Exhibit DNREC 1 The team developed five categories of impacts which it determined were important enough to assess. Ms. Herr proceeded to explain each criteria to the Board. Ms. Herr testified that the encroachment category was not irrelevant as two of the applications being considered were not prepared by Mr. Launay. Also, the pre-existing structures did not all meet the criteria.

Ms. Herr testified that the importance of the third category, mean low water depth at the dock, was to assess a secondary impact. If there was very shallow or no water at low tide at the end of the dock, every time one operated a boat it created more impact by disturbing bottom sediments by potentially having the boat itself with its anti-fouling paint sitting in the sediment. It also creates a stronger enticement for boat owners who are stuck and cannot get in their dock at low tide to prop wash, thus creating another impact.

Ms. Herr testified that the Glade L.L.C. received a correct score of 4 under the pier location category. The fifth category, walkway length, was an attempt to assess the number of pilings going to be used. Longer walkways create more shading and more treated wood in the sediments. Ms. Herr testified that the exceeds allotment category resulted from some literature searches performed prior to the development of the matrix. Some guidance documents from the EPA and other states using cumulative impact analysis were found. In these documents, the importance of relative impact of one structure to another was important. The "exceeds allotment" category compares the total impact of one structure versus the total impact of another structure. The total of the sub-scores was

divided by 30, the number of applicants. Each applicant was entitled to one thirtieth of the allotted impact. If the applicant exceeded their allotment they received the higher score.

Ms. Herr testified that once all the scores were totaled the Department started a running cumulative total starting with the applications with the lowest score and kept adding until they exceeded a number equal to 50 percent of the total of all of the scores. Ms. Herr testified the Department stopped using the matrix at the Glade because it was a one time analysis. The 50 percent threshold has already been determined and permits have been issued for those structures. Any new applications would not be assessed based on the matrix. The Department considers the threshold reached and is not applying the matrix any more. The new applications have a higher burden to bear to get approval. This burden is not impossible as applications can include possibilities for compensation of some sort or structures could be removed.

Ms. Herr further testified that the Glade L.L.C. has another application pending which involves a joint application with Mr. Sypek of lot 69 for a shared wetland walkway and two docks for two vessels. Ms. Herr testified that the average channel depth would not be a better component for the matrix than the mean low water depth at the dock category. She further testified that had the Department used the score of 145 for the Glade L.L.C. as proposed by Mr. Launay, it would still have been denied.

Upon questioning by the Board, Ms. Herr testified that the Reed and Strother applications were approved while they were in the negotiation process with the batch applications out of fairness to those applicants. To some extent, first come first served played a part and they had been waiting patiently for years. Ms. Engle was considered outside the entire process since it was a repair-replace and not a new structure.

Upon cross-examination, Ms. Herr testified that although this particular scoring system was developed for the Glade, the categories and concepts considered would be applied in other locations. Prior to the Glade, the Department had considered the idea of doing cumulative impact analysis however a matrix had not been developed. She testified that Mrs. Engle's application was received by the Department February 23, 1996, Mr. Reed's was received May 9, 1995 and the Strother application sometime in 1993. She testified the group of applications by Mr. Launay were substantially complete and submitted by August of 1996. The Engle application was approved in May of 1996 and Reed and Strother in September 1996.

She further testified that the team determined it was necessary to lump those walkways longer than 250 into one category in terms of the amount of impact. She agreed that there were 41 potential riparian lots at the Glade and the potential for those 41 lot owners coming in individually seeking permits exists. She acknowledged that no scientific studies were developed to reach the goal of 50 percent. It was a result of balancing the benefits versus the developments and environmental terms for each project. She testified there was never a determination by the Department to deny half of the applications. The Department wanted to reduce the impacts by 50 percent. It just happened that the 50 percent reduction in impacts resulted in about half of the applications being denied.

Ms. Herr testified that following the denial of some of the batch applications, the Department did settle with Fritz-Choy and some other appellants. She admitted that this put the Department over the threshold. The settlements however, did not involve the matrix and included other compensating factors. She testified that the threshold could move higher depending on the applications submitted. She testified that a pre-application negotiation to minimize size of structures does not guarantee approval of the application.

FINDINGS OF FACT

1. The matrix test was a reasonable means by which DNREC measured and attempted to minimize the impacts of all the proposed and existing structures in the Glade by 50 percent.
2. The 50 percent limit was reasonable based on the observations of the DNREC officials and their combined experience.
3. The granting of permits to Strother, Reed and Engle was reasonable, despite the pending batch applications.

CONCLUSIONS OF LAW

The public policy in Delaware is "to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands". 7 *Del.C.* § 6602 "Subaqueous lands within the boundaries of Delaware constitute an important resource of the State and require protection against uses or changes which may impair the public interest in the use of tidal or navigable waters." 7 *Del.C.* § 7201 Any person whose interest is substantially affected by the action of the Secretary or the Department may appeal to the Environmental Appeals Board pursuant to 7 *Del.C.* §§ 7210 and 6008. "The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board." 7 *Del.C.* § 6008 (b) Under circumstances where the initial full adversarial hearing is before the Board, the Board must be allowed to receive additional evidence and there is less apparent need for explicit deference to the Secretary's expertise. *Tulou v. Raytheon Service Company and the Environmental Appeals Board*, Del. Super., 659 A.2d 796, 805 (1995).

The Board has already determined through its previous order in this matter that the Glade L.L.C. was "substantially affected" by the denial of the permit. (See June 18, 1999 Order at p. 6) As

such, their appeal is appropriate under 7 Del.C. § 6008 (a). Under the Wetlands Act, the Secretary shall consider several factors prior to the issuance of any permit. 7 Del.C. § 6604(b) Those factors include environmental impact; aesthetic effect; number and type of public and private supporting facilities required and the impact of such facilities on all factors in this subsection; effect on neighboring land uses; state, county and municipal comprehensive plans for development; and economic effect.

Mr. Chaconas testified the Holland Glade was a typical high-quality salt marsh habitat. He testified high-quality wetlands have several environmental functions. This waterway provides shelter to animals, places for nesting, places to hide from predators, and food for animals. The construction of walkways across the marsh and the fragmenting that occurs causes negative environmental impacts to the marsh. Mr Chaconas testified each additional structure has a negative environmental impact. The testimony revealed the damage caused by the placement of pilings, leaching of the wood used for the structures, alternatives to such wood, shadowing by docks and the damage to the bottom of the waterway as a result of back washing, and getting stuck at low tide.

It is clear from the testimony that both the Department and the residents of the Glade made great efforts to minimize these negative impacts to the Holland Glade. The Department considered numerous alternatives prior to the batch applications being submitted. The landowners also made numerous adjustments to their plans for docks and piers. The Board is satisfied that the Secretary made substantial efforts to examine all of these factors in deciding whether or not to grant the permit application of the Glade L.L.C.

The Board recently addressed this same water body and similar permit denials in the *Seglum/Jones* Appeal EAB Appeal Number 98-06. In that decision, the Board determined that the

fifty (50%) percent reduction in cumulative impacts was "a reasonable figure based on the collective visual observations and experience of the DNREC officials in monitoring this and other wetland areas".(Order at p. 19) The Board determined that it is "reasonable for DNREC to set its limits based on observed damage and projected damage which would result from the grant of additional permits instead of granting permits to all riparian owners in the hope that the damage can be corrected at a later date." (Id. p. 19)

Pursuant to the Subaqueous Lands Act, 7 Del.C. § 7205(a), "[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility, upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department." Under the Regulation Governing the Use of Subaqueous Lands 1992, section 3 "[a]n application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently." Although the matrix had not been used previously, and was developed for this particular application batch, it was clear from the testimony of Ms. Herr that this was an unusual circumstance. Ms. Herr testified that "it's very rare for [DNREC] to have a system like Holland Glade that is relatively undeveloped and then suddenly have altogether within a six-week or two-month period a large influx of applications." The Board has previously determined in *Seglum/Jones* that the matrix was a fair and reasonable approach to resolving how and to whom permits should be issued. The Department developed the matrix analysis in an effort to fairly evaluate the initial cluster of applications that were submitted to the Department for walkways and docks.

In the City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004, Del.

Supr., 607 A.2d 1163 (1992), the Court held that riparian rights are property rights and among those rights is the right to have free access to navigable waters. It is well settled however, that "the State possesses the power to regulate or restrict private riparian property rights for public purposes without the payment of compensation". Id at 1168. The restriction of such however, cannot be arbitrarily undertaken by the Secretary.

There was a great deal of testimony regarding the matrix. Why certain categories were used and how they were scored was a point of disagreement between the Department and the Appellant. The Board has determined, however, that the Department's reasons for categorizing and scoring the different variables affecting the water way were reasonable. The sample matrix introduced into evidence sets forth each of the categories as well as how they were scored. Exhibit DNREC 1

The testimony of Mr. Launay and Ms. Herr set forth in detailed fashion the reasons behind each category and score. Although Mr. Launay disagreed with the need for some of the categories and the manner in which they were scored, he did not sufficiently prove to the Board that the categories or scoring were arbitrary, capricious or unreasonable. The reasons for the categories and scoring were supported by the testimony of Ms. Herr and shown to be relevant to the assessment of the cumulative effects of piers, walkways, and docks on the water way.

In developing the matrix analysis, the Department attempted not to arbitrarily grant or deny permits. As held in *Seglum/Jones*, the Board believes the Department was successful in this attempt. Although three additional permits were granted (Strother, Reed, and Engle), they were granted for valid reasons. Mrs. Engle's permit request was for repair-replacement to an already existing structure. It was reasonable for the Department not to include her in the batch of new requests for permits. The other two permit requests were received before the batch of applications were

submitted and the Department, in good faith, granted them partly because they were first in time and partly to show their willingness to work with the landowners through this permitting process.

After applying the matrix and determining that the Glade had reached the 50 % limit set by DNREC, permits were denied based on the potential harm to the environment either singularly or in combination. The Department determined the Glade's maximum capacity to protect against loss or despoliation and those permit requests beyond that limit were denied. Even accepting Appellant's argument that its score should have been 145, this still would have been beyond the permissible cumulative impacts determined by the Department. Although the score of the Glade L.L.C. was either the same as Strother at 155 or Reed and Engle at 145, the reasons why Strother, Reed and Engle were approved are clear and reasonable. The Board finds no discrimination against the Glade L.L.C. based on the approval of these three previous permit requests.

At the beginning of the hearing the Department renewed its Motion to Dismiss. The Board reserved judgment until the close of the hearing. Based on the evidence presented to the Board the Motion to Dismiss is **DENIED**.

Based on the evidence presented, the Board is satisfied that the decision to deny the permit application submitted by the Glade L.L.C. was not made in an arbitrary and capricious manner. The Decision of the Secretary is sufficiently supported by the evidence presented to the Board. The Board is further satisfied that the Glade L.L.C. permit application was not treated in a discriminatory manner by its denial. The Board believes the denial to have been reasonable. Based on the holding in *Bailey v. Philadelphia, Wilmington and Baltimore Railroad Co.*, Del. Ct. Err. & App., 4 Harr. 389 (1846) and *City of Wilmington v. Parcel of Land Known as Tax Parcel No. 26.067.00.004*, Del. Supr., 607 A.2d 1163, (1992), and the Board's decision in *Seglum/Jones* Appeal EAB Appeal

Number 98-06. Although the Appellant's private riparian property rights were regulated and/or restricted by DNREC, they are not entitled to compensation.

The Board hereby **AFFIRMS** the decision of the Secretary.

IT IS SO ORDERED this 23rd day of December, 1999.

Joan Donoho

Joan Donoho, Chairperson

The Glade L.L.C. Appeal 97-07



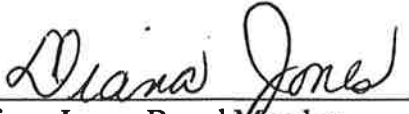
Robert S. Ehrlich, Board Member

The Glade L.L.C. Appeal 97-07

A handwritten signature in black ink, appearing to read "Robert I. Samuel". The signature is written in a cursive, flowing style with large, connected letters.

Robert I. Samuel, Board Member

The Glade L.L.C. Appeal 97-07


Diana Jones, Board Member

The Glade L.L.C. Appeal 97-07

Charles Morris
Charles Morris, Board Member

